

**U.S. DEPARTMENT OF COMMERCE
National Technical Information Service**

PB-284 178

**Transcript of National Commission on New
Technological Uses of Copyrighted Works Final
Meeting Held at Washington, D.C. on July 10, 1978**

**U.S. National Commission on New Technological Uses of
Copyrighted Works, Washington, D.C.**

10 Jul 78

BIBLIOGRAPHIC DATA SHEET		1. Report No. CONTU 78-0007	2.	PB 284 178	
4. Title and Subtitle Transcript, CONTU Final Meeting			5. Report Date July 10, 1978		
			6.		
7. Author(s) National Commission on New Technological Uses of Copyrighted Works (CONTU)			8. Performing Organization Repr. No.		
9. Performing Organization Name and Address National Commission on New Technological Uses of Copyrighted Works (CONTU) Washington, D. C. 20558			10. Project/Task/Work Unit No. P.L. 93-573		
			11. Contract/Grant No.		
12. Sponsoring Organization Name and Address Same as no. 9			13. Type of Report & Period Covered		
			14.		
15. Supplementary Notes					
16. Abstracts A Transcript of the final meeting of the Commission held in Washington, D.C., on July 10, 1978. At the meeting the Commissioners present discussed the Commission's Final Report with its Concurring and Dissenting Opinions and voted unanimously to submit the Report to the President and the Congress and to have it printed for public distribution.					
17. Key Words and Document Analysis. 17a. Descriptors Copyright Computer programs Computer software Data bases New works Photocopying Machine reproduction Libraries CONTU Final report					
17b. Identifiers/Open-Ended Terms					
17c. COSATI Field/Group					
18. Availability Statement Release Unlimited			19. Security Class (This Report) UNCLASSIFIED		21.
			20. Security Class (This Page) UNCLASSIFIED		22. Price PC-A03/MF-A01

NATIONAL COMMISSION ON NEW TECHNOLOGICAL USES OF
COPYRIGHTED WORKS

- - -

MONDAY, JULY 10, 1978

10:25 a.m.

COMMISSION MEMBERS PRESENT:

Stanley H. Fuld, Chairman
Melville B. Nimmer, Vice Chairman
E. Gabriel Perle
Robert Wedgeworth
Dan Lacy
Hershel B. Sarbin
Alice E. Wilcox
George D. Cary
John Hersey

Daniel J. Boorstin
Barbara A. Ringer
Edmund L. Applebaum

Staff Present:

Arthur J. Levine
Robert W. Frase
Michael S. Keplinger
Christopher A. Meyer
David Y. Peyton
Patricia T. Barber
Dolores K. Dougherty

Room G-110, Whittall Pavilion
Library of Congress
Washington, D. C.

P R O C E E D I N G S

CHAIRMAN FULD: May I call this final meeting of the Commission to order, and welcome, ladies and gentlemen and fellow Commissioners. May we start with a statement by Mr. Levine?

MR. LEVINE: Rather than a statement, actually, at this time, I would like to say something at the conclusion. But I would like to just discuss a little bit the final report which you drafted, which you have in front of you. It will still require some editing for typographical errors and possible clarity in language. I think the report is in the form, other than those minor changes, that the Commission has approved. It includes majority opinions, followed immediately by any concurring or dissenting opinions. Perhaps the best place to look is at the table of contents which is on page vi.

There are a number of appendices, a couple of which are not yet entirely completed; that is, staff biographies, for example. Apart from that, the report is complete as it is before you.

I would suggest that any of you who have any suggestions for changes -- editorial, or other -- please let us know no later than --

COMMISSIONER PERLE: This afternoon?

MR. LEVINE: Well, that would be preferable, but I am not sure how many Evelyn Wood graduates we have in the room; preferably no later than a week from today.

We will then inform all of the other Commissioners of any changes that we have made in this document, and if there is any disagreement, you can let us know immediately.

There are a number of ways we can print this. I have several different Commission reports. This is the Electronic Funds Transfer Commission report. I would suggest the size is really an awkward size and not one that we would want to use, but this is done by taking camera-ready copy, rather than sending the report to print. And let me just pass these around so that you can look at them.

COMMISSIONER PERLE: It is done by what?

MR. LEVINE: They would essentially take this and make photos. I don't know the technical -- I asked my colleagues from Time, Incorporated to tell me the process.

CHAIRMAN FULD: That would be fair use?

MR. LEVINE: Yes, that would clearly be fair use. It is also a government publication, so I think we are safe in that.

The report of the Privacy Protection Study Commission

was done by setting type, and I will send this one, if I may, around. Obviously, the Electronic Funds Transfer type of report can be done much more quickly than if the report has to be set in type. It would be done by GPO; we can get certain time preferential in terms of having it printed.

It may be necessary for us, in order to comply with the statute, to submit copies other than in printed form, pro forma copies, to the President, to Congress, replaced by printed copies when they are available. The printed copies would be the ones that would be distributed to the public.

VICE CHAIRMAN NIMMER: Did you say there is a choice as to whether the report will be reproduced by copying from this type of type, as an alternative to setting the type?

MR. LEVINE: Yes.

VICE CHAIRMAN NIMMER: I would just like to suggest a point of view to you here. We are concerned with the impact of the printed word. I think, somehow, the impact of type set carries a kind of a connotation that gives it more weight than otherwise. And I don't think there is that great time urgency as far as getting it out.

CHAIRMAN FULD: I would concur; I would subscribe to that, too. And I think that the size of the book should be more of this sort (indicating) than the one that went around

the table.

MR. LEVINE: Yes, I do think that this is an unwieldy format, and it would either be in this size (indicating) or in the size of the Privacy Commission report.

COMMISSIONER WEDGEWORTH: What are the factors involved in making that choice?

CHAIRMAN FULD: You mean money-wise?

COMMISSIONER WEDGEWORTH: Well, is money one of the factors?

MR. LEVINE: Proposition 13 doesn't extend beyond California, Bob.

COMMISSIONER WEDGEWORTH: Well, I was a bit curious about yours and the Judge's opinion. I was going to ask, does this mean that you are now going to give less weight to the opinions of the New York Times than you did before when it was type set.

COMMISSIONER LACY: Well, it is still type set.

COMMISSIONER CARY: It is cold type.

VICE CHAIRMAN NIMMER: I wasn't talking about the process so much as the appearance of the final product. And, there, it is not a logical distinction, I grant you, but nonetheless it is a real one.

COMMISSIONER WEDGEWORTH: You mean the margins, the

justifying of margins and that sort of thing?

VICE CHAIRMAN NIMMER: Well, just the nature of the type.

COMMISSIONER LACY: Proposition 13 does extend beyond California, because it decreases California's payments to the Federal Treasury by about \$4 billion. But I don't think we ought, necessarily, to take advantage of that and be wasteful.

What is the difference in cost factors, Arthur, between the two?

MR. LEVINE: There is a difference. Do you recall -- we discussed this last week -- do you recall what the difference was?

MR. KEPLINGER: Not precisely, but the difference comes in the cost, of course, of setting pages.

MR. LEVINE: The Congress, in establishing --

COMMISSIONER LACY: I have a hunch you are talking about a difference of about \$10,000, if I had to guess.

COMMISSIONER PERLE: We have the money, don't we?

MR. LEVINE: Yes. The Congress, in establishing the Commission, appropriated funds for printing, which are well in excess of anything that it would cost to print it in cold type, and that suggests, at least, a Congressional intent that we

print it in the best possible format.

CHAIRMAN FULD: Alice?

COMMISSIONER WILCOX: I wonder if consideration -- how this impacts on its degree of dissemination and method of dissemination, and how many we are going to print, how it is going to be disseminated, whether it is going to be --

CHAIRMAN FULD: Talk a little louder, Alice.

COMMISSIONER WILCOX: Whether it will be free, or have to be bought; whether this will impact on that.

MR. LEVINE: I anticipate an initial printing of 3,000 copies will be more than sufficient.

COMMISSIONER PERLE: I can't imagine that will be sufficient.

MR. LEVINE: Really?

COMMISSIONER LACY: I think, Mr. Chairman, this relates to a question that I had wanted to raise as to whether it was contemplated that a summary -- perhaps a 25-page or so summary that might be an introductory chapter of the full report, but also might be separately printed -- might be available. I suspect there is a limited number of people with a professional concern in the report who really would be concerned with reading a full 100-odd plus page, 200-odd plus page report in detail, but who might want to know what we

really came up with, what the final conclusions were. And that might be picked up rather fully in the press if there were sort of a short summary, certainly in the professional press. And if we had a quite large number, a 25-page or so summary available, it might be that 3,000 or even fewer might be adequate for the full report.

But quite apart from the possibility of saving on copies of the full report, I think having a short, laymen-accessible report, a summary report, would have a great advantage to it at this time, if the staff could write one.

COMMISSIONER SARBIN: Are you at all concerned though, Dan, about the need to circulate the summary and to secure agreement with the Commissioners?

COMMISSIONER LACY: Yes, that would be a problem.

COMMISSIONER SARBIN: That is why, to put it in as a part of the report, it would concern me.

MR. LEVINE: There are portions of the report that could be lifted and used as a summary now. We have recommendations listed in the beginning and history of the Commission and its recommendations in a 30-odd page document.

COMMISSIONER LACY: Well, perhaps you wouldn't need it as a chapter of the full one; perhaps you could just by lifting the summary sections of the full report put it together

CHAIRMAN FULD: Gabe, did you have something to say?

COMMISSIONER PERLE: No, not anymore.

COMMISSIONER SARBIN: I think you are going to need more than 3,000 copies, though.

COMMISSIONER HERSEY: Yes, I would agree.

COMMISSIONER SARBIN: There will be that much interest in it.

COMMISSIONER PERLE: It is cheaper to print a lot at once than going back to press.

CHAIRMAN FULD: Yes, Mr. Cary?

COMMISSIONER CARY: It seems to me -- to answer partly what Alice had just discussed earlier -- that one of the advantages of having this printed by GPO is that the depository libraries are all going to get copies under that statute, which I think would be most helpful.

COMMISSIONER SARBIN: I have just one more suggestion about the printing. Just be sure that the spine contains a clear description of what we have got, as it sits on the shelves of the corporate libraries, et cetera.

MR. LEVINE: You mean a summary, Hershel?

COMMISSIONER SARBIN: Not a summary, no. I think the books that have been passed around are very good in that respect, and sometimes one does forget it.

MR. LEVINE: This is just three words. We will have to have a Commission report this long (indicating).

COMMISSIONER SARBIN: With everybody's name on it, right.

(Laughter.)

CHAIRMAN FULD: Is there anyone else? Are you finished, Arthur?

COMMISSIONER PERLE: With leather binding for the Commissioners.

CHAIRMAN FULD: Why is he joking?

(Laughter.)

COMMISSIONER PERLE: I'm not.

COMMISSIONER SARBIN: Because he wants to finish as we began.

COMMISSIONER PERLE: In a blaze of laughter.

CHAIRMAN FULD: Have you completed your report?

MR. LEVINE: Yes, I have.

CHAIRMAN FULD: Any other queries?

(No response.)

CHAIRMAN FULD: It was suggested that statements be made or read, and I will take the initiative and start with a statement that I have prepared.

At the initial meeting of this Commission, known by

the acronym CONTU, on October 8, 1975, I stated it was my belief, and I quote, "that reasonable people can find solutions to the most difficult of problems." My experience in serving as Chairman of CONTU during the succeeding 33 months has confirmed that belief. In my view, not only will the work of this Commission have a significant impact on laws and practices in this country affecting copyright, but the final report will be looked to by those countries of the world who are just beginning to face the impact of new technologies on works of authorship.

We can, I think, be justly satisfied both with our final report and with the process by which we reached our conclusions. Although some among us were experts, a number began with little background or understanding of either the copyright law or the new technologies we were called upon to accommodate to that law. Of necessity, therefore, the Commission's initial activities were given over to educating its members in the intricacies of the subjects confronting them. Then, such process concluded, we divided our tasks among four subcommittees. We held 24 public hearings, at which we solicited the views of individuals and organizations having a direct economic interest in our work, as well as academics and others, all of whom through their testimony contributed significantly to the

conclusions reached in our final report. We recognized that the interests of organized consumer groups would not be heard unless we as a Commission actively sought their reactions and counsel. This, we did by sponsoring sessions at which, first, consumer representatives had an opportunity to express their views and, second, a public interest economics consulting firm which we contracted furnished an economic analysis of the issues involved.

Our Commission offered its good offices to the Congress in bringing together the libraries and author group and the publisher group on guidelines with respect to permissible inter-library loan activities. It is a matter of regret, I digress to interpolate, to note that the atmosphere of good will and accommodation which characterized and accompanied the negotiations leading up to acceptance of our CONTU guidelines did not continue after the new law was enacted. I cannot resist observing that the public good is ill served by the inability of those groups to resolve their differences in the public interest and in the spirit of mutual respect.

It is a source of particular gratification to record the collegial way in which our mission has been accomplished. We are a diverse Commission, as we should be, but the diversity has not led us to rigid adherence to preconceived notions or

to views previously held. Rather, there has been a marked devotion to the attainment of a consensus regarding the problems created by computers and reprography, which has led in all, save one instance, to virtual unanimity among a small community of authors, publishers, librarians, teachers, lawyers, and consumers. When we have divided and disagreed, as we have on the subject of computer programs, we have done so forcefully, but reasonably, and this, I suggest, renders our report all the more useful to its members and to its readers.

Before concluding, may I say on a more personal level that I have profitted immensely from service on this Commission, from knowledge acquired as well as from friendships made, and that the respect and high regard each of us developed for one another rendered our task the more rewarding.

Finally, I know that I speak for all of us, my fellow Commissioners, in thanking Arthur Levine, our Executive Director, and all the others on the CONTU staff for their dedication, support and assistance.

Mel, do you wish to make a statement?

VICE CHAIRMAN NIMMER: Yes. I don't have a prepared statement, but I would like to say a few words.

I think this has been a worthwhile experience, certainly for the Commissioners and I hope for the public that

will have opportunity to study our report. In my observation, this has been a most conscientious and able Commission that went about attacking a very difficult set of problems, and if we have not completely solved all of them, or maybe any of them, I think there is reason to believe that we have made some meaningful contribution toward their solutions.

I would like to say a few words substantively just by way of a broad view on the several different areas that we were concerned with. With respect to computer programs, one area that was proved to be the most controversial among us, I, for one, do not regret that we did not reach unanimity, because that would not be, perhaps, a reflection of the real world, and I think it is well that we should share with the public at large our own internal doubts and not attempt to put a face on it of complete unanimity. I think Commissioner Hersey's dissenting report is one that certainly is worthy of study, worthy of careful study and thought, as I tried to indicate in my concurring opinion. Nevertheless, as I also indicated, on balance, I am prepared to go along with the majority opinion; namely, that computer programs are and should be regarded as copyrightable. But I do so with some misgivings, the nature of which are stated in my concurring opinion. And I think it is well that the public should be aware of the nuances and the

conflicting forces at work on this difficult area. So, I emerge quite satisfied with the result in that area, even though it is not a unanimous result.

With respect to data bases and new works, the issues, I think, are clearly easier. It is, clearly, more simply a question of adapting established copyright principles to this new context. And our conclusions there, it seems to me, are almost inexorable -- that may be dangerous to say, but it seems to me that they clearly do follow and, at the same time, perhaps cast some light in this area for those who haven't had the opportunity to study these areas.

With respect to photocopying or, more generically, reprography, the area that I was most closely concerned with in our proceedings, I must confess, to some disappointment, in that, initially, when we first met, I had hoped that we would probe to the very bottom of this issue and come up with, perhaps, some plan for adapting this new phenomenon to the copyright law in a way that goes beyond what the Copyright Act of 1976 has done. In large part, we have not done that, but I agree, after going over the problem and after hearing testimony and thinking about it and talking with my fellow Commissioners, I agree that what we have done is right; that is, that the time simply was not right for anything more than

what we have done. Certainly, there is no kind of consensus or anything approaching a consensus as between the library groups and the author groups and the publisher groups with respect to that, and to make any kind of a recommendation absent such a consensus or near consensus would be an act of futility.

But beyond that, it is true that we are just beginning to have experience under the new Copyright Act in the area of photocopying, and I think we have to give it a chance to see how it is going to work in practice before we or our successors, whoever will be concerned with this problem, come up with any specific recommendations, if any turn out to be in order.

Now, we have made at least one recommendation for legislation in the photocopying area. And I know when I say "photocopying," there are those who say that is an unduly narrow term, but for me it is adequate. We have made one specific recommendation having to do with a notice, a warning notice that must be posted in commercial copying shops. I, for one, think this is a very important provision that I hope very much Congress will look at and implement, because this is one area where there is a substantial void of copyright law, not theoretical copyright law, but, in practice, applying it.

And it seems to me that this warning notice can be quite meaningful; a good deal more meaningful, I might add, than the Surgeon General's warning, I think, in its specificity and for various other reasons that I need not go into. I think it would prove most useful, and I, for one, and I am sure my fellow Commissioners, join in hoping that Congress will give serious consideration to this proposal.

Let me simply add that my working on this Commission has been a genuine pleasure for me to work with all of the Commissioners, whom I have found to be delightful to work with and highly intelligent and probing in their approaches. We certainly have one terrible void that we are missing, that we had to begin with, Dr. Dix, whose passing we all most greatly regret. I join with the Judge, our Chairman, in commending our staff, Arthur Levine and the rest of the staff, whom I think have been marvelous, who have contributed very greatly. At our first meeting, I talked about our being a working commission, our doing our work. Well, we have to a degree, and I don't think we need feel that we haven't adequately contributed. But I think, realistically, we must also recognize the terribly great contribution that the staff has made, and I think they have done just a fine job.

And, finally, I would like to note my pleasure at

the presence of the Librarian of Congress at our final meeting, whose experience in all these fields is very great, and I am very happy he is participating in this culmination.

Thank you.

CHAIRMAN FULD: Would any other Commissioner like to make a statement? Dan Lacy?

COMMISSIONER LACY: I leave the Commission with a feeling of real satisfaction about what we have been able to do in the computer field. When the Commission sat, I had anticipated that this would present enormously complex and difficult problems, and probably would require difficult legislative drafting. And I think it has been, with a measure of surprise, as we probed further into it, we realized that it was a kind of problem best dealt with by the extension of general principles of the copyright laws that were embodied in the 1976 Act and that, surprisingly, little amendment of that Act would be necessary. And I must say I leave feeling confident that if Congress adopts the few minor recommendations we have made for legislative change in definitions and in Section 117, there will have been provided a copyright framework that will ^{it} make possible for society to go ahead with the effective utilization of the enormous powers of computer programs and data bases. And I know from personal experience and knowledge,

that that will open up a flow of investment in research and development and innovative enterprise that has been hesitant and held up for some time by the uncertainty surrounding it.

I think, also, the fact that the United States has been in the forefront, obviously, of the development of computer technologies has meant that most other countries have been looking to the recommendations of this Commission as important, leading points in their own consideration of national legislation on these scores, and I anticipate that there will be a really international impact from those recommendations.

On photocopying, I think we all face a somewhat similar sense of frustration arising, in part, from the fact that after the Congress had charged us with solving that problem, they went ahead and solved it; at least they went ahead and legislated a major decision, leaving us with a limited area of potential change since it was obviously impractical to recommend major changes until there had been experience with what Congress itself had created.

But one thing, indeed, I do believe, has been achieved over and above the assemblage of a lot of factual data previously unavailable and going beyond the provision that Mr. Nimmer has referred to with respect to commercial copying, and that is the fact that I think there was a general feeling

at the beginning of the work of CONTU that the photocopying issue was, in the current jargon, a "zero-based game" -- that is, a situation in which you had a fixed institutional structure and a fixed set of technology to be used within that structure, and two opposing sides -- proprietors, represented by authors and publishers; mostly users, with librarians as their principal spokesmen -- that any gain of the one side could only come at the loss to the other side, and that the only possibility was achieving some sort of a balance of dissatisfactions or somewhere in the center of between these two bipolar positions.

I do hope that our considerations have left us with and may have convinced others, and they convince others that, in fact, we are dealing not with a zero-based fixed position, but with an evolving situation in which new institutional structures are or may be coming into place and in which new technologies are or certainly will be used, and where the role of copyright may not be simply to maintain a balance between opposing sides in an unchanging situation, but may provide the incentives and guidelines that will help to stimulate the development of new institutions and the use of new technologies in socially desirable ways in which everybody will benefit. And I very much hope that it will be with that breath of mutually

rewarding exploration that the Register of Copyrights' five-year study of the copying problem and the participation of both sides in it will take place.

I would like to hope that we would come out of that not with the feeling that the balance needs to be nudged a little bit this way or a little bit that way under an old system, but that we can help to evolve better ways of dealing with our problems as a whole. And certainly, if the cooperative attitudes expressed within the Commission itself can persist among all the interests involved in that five-year Commission, we can feel hope that that outcome will happen.

And finally, I would like to associate myself with everything Judge Fuld and Mr. Nimmer have had to say about the pleasures of working together and about our indebtedness to the staff.

CHAIRMAN FULD: George Cary?

COMMISSIONER CARY: Mr. Chairman, many years ago, the wise Sophocles said that a short saying often contains much wisdom.

More recently in our history, Abraham Lincoln once said, "I would rather keep my mouth shut and be thought a fool than to open it and remove all doubt." Whichever of these viewpoints you may share, I will be very brief.

I, too, would like to express my agreement with the statements that our Chairman has made, as well as our Vice Chairman. But it seems to me that what is a conclusion with us is really the beginnings of something for others, and I think we can all hopefully express our feelings that the ball is not dropped in mid course, but is carried on to some final conclusion. And that, to me, is something that only time will tell, and we will have to wait and see what the results are.

In concluding my brief remarks, I, too, would like to express commendation for the excellent staff work that has resulted and that has produced all of the necessary work that we have had. And I would like to commend Commissioner Hersey for his participation on the computer issue, because it seems to me that -- if I may go along with what Professor Nimmer has said -- that, in effect, what ceases to be a subject of controversy also ceases to be a matter of interest. So, I think he has produced a significant contribution to this work. So, I conclude by saying hail and farewell.

CHAIRMAN FULD: Anyone else? John Hersey?

COMMISSIONER HERSEY: I guess this Commissioner shouldn't go down for the third time without at least a "glug."

(Laughter.)

CHAIRMAN FULD: How do you spell that?

(Laughter.)

COMMISSIONER HERSEY: I am sorry I missed the occasion last night, because I value the friendships that this Commission has produced; even disagreement seems to stimulate friendship in some way. And I think one of the significant things about this Commission has been that librarians, publishers and authors could sit down and talk reasonably together and productively together.

I also would like to thank the staff, particularly Art, Mike and, in my case, very especially Jeff, and Dee, and others, for their part in my partial education, at least up to now.

On photocopying, it seems to me that our problem was that we let ourselves be obsessed as we went into the exploratory period with the controversy that was on the surface at that time; namely, library photocopying, library loan photocopying. And I think we did not explore sufficiently and we did not develop research sufficiently on the other kinds of copying, which may, in fact, be the greatest volume of all. And I think if we had developed research on copying on unsupervised machines, on copying mills, and so on, we might have been able to come up with something less improvised in our final conclusions in that part of the report.

On computers, with respect to data bases, I feel some concern for the long run about the problem of the dynamic nature of data bases. All other copyrighted works in the past have been fixed in relatively stable form: a book is a book; a telephone book is a book, at least for a year, and then it is recopyrighted; a lampshade remains a lampshade. But many data bases are changed very rapidly, sometimes in microseconds, sometimes so extensively that they may change in nature over the period of time, and I see that there may be problems arising from that dynamism that we haven't wholly foreseen.

With respect to new works, it seems to me that the conclusion is self-evident and quite right.

On programs, I feel some sadness in the end that after three years of work we are going to recommend to Congress that it commit a crime against humanity; a very small crime, I must say, in the whole scheme of things, so small that one wonders whether we should have spent three years preparing for it; certainly ridiculously small compared with the violently criminal negligence of Congress on energy; nevertheless, a little crime that may add to others to trouble posterity. The crime I speak of is that of aiding and abetting the drift from human dominance of the technology toward the technology's dominance of human kind. I have heard you say, Mr. Chairman,

that we are going to have dehumanizing effects from computers no matter what, so how could it matter that programs be copyrighted.

Well, I think that the act of broadening copyrights to include protection, for the first time, of communication not with human beings, but with machines does push us along the direction of that drift in a small way. And I think that this may combine with other things that push us that way to give us trouble in generations to come of a small kind. Maybe no one will notice, but it seems to me that this is something that is a matter of potential concern.

Naturally, being so convinced of the correctness of my view, I have been astonished that I haven't been able to persuade the whole Commission of it. And I see three deficiencies in myself that have caused this possibly: One is that I am not a lawyer; another is that I am not a computer expert; and the third is that I am not tactful.

(Laughter.)

COMMISSIONER LACY: And there is the possibility that you are wrong.

(Laughter.)

COMMISSIONER HERSEY: I am the last to acknowledge that.

(Laughter.)

COMMISSIONER HERSEY: I suppose that the last of these -- the lack of tact -- has probably been rather serious once, but it is habitual and I will go right on with it and say that I have felt that the first deficiency -- that of not being a lawyer -- has been a very serious one for me.

CHAIRMAN FULD: But it has been very helpful.

COMMISSIONER HERSEY: Not to my argument, alas. I feel that had I -- well, I will put it in terms of bad manners, as I so often do. I have had a feeling that a lot of time we have been too lawyerly on this Commission. As I think of the Constitutional issues that are before us, I think of the way in which Jefferson and Madison and Adams and others went at these issues, not thinking in terms of precedent and fine points, but in terms of fundamental principles and basic human needs. And so, I wish we had spent less time on Baker versus Seldon and more time on philosophy as we have discussed some of these issues.

CHAIRMAN FULD: Even lawyers who don't know the subjects.

COMMISSIONER FULD: Yes, they do, and they write dazzling briefs. We have been staffed by lawyers, and on this issue, we have been committed by a judge and two lawyers, and

the briefs have been dazzling and very hard for someone who is not a lawyer to respond to.

As for the technical expertise, I think we were early swamped by witnesses who were experts on this technology and who had the interests of the companies they represented. When a witness like McCracken, deftly led by a Miller, told us that there were infinite numbers of ways to express a computer program, I think we swallowed it whole; we went along with it and forget that this was a stage in the production of the computer and that the end product was a mechanical one.

I think what has distressed me about it is that the two witnesses we have had, the only two witnesses we have had who had nothing to gain or lose from the outcome of our deliberations, the two MIT professors, have been completely bypassed in the conclusions that we have come to. I wish we had had more disinterested testimony.

So, at times, I had wished that I were a computer lawyer, a tactful computer lawyer, and maybe I would have been able to -- the possibility exists that I am wrong. I do want to say, though, on the issue of manners, when Gabe dressed me down three meetings ago for bad manners in the way I put a response to the Subcommittee, I gave a peaceable answer because I thought a shouting match at that point was not in order. But

I didn't withdraw, and I don't withdraw, from the substance of some of what I said. I think there are still inaccuracies and grossly misleading statements in the report as it stands. There are inaccuracies in my dissent, two of which Mel Nimmer has pointed out to me this morning, and I am going to correct them. I acknowledge that I certainly can be, and often am, wrong, and maybe about this issue, but I come away with a feeling, a heavy feeling that we may have to account in the long run for a petty crime that is going to concern us.

CHAIRMAN FULD: May I say that I have never perceived a lack of tack on your part.

COMMISSIONER HERSEY: You are too kind, Judge Fuld.

CHAIRMAN FULD: Anyone else?

COMMISSIONER WEDGEWORTH: Just a couple of brief points, Judge.

With regard to the software and data base portions of our final report, when I received Commissioner's Hersey's latest document, I felt that I needed to go back to review where we had started with this issue, and I think that I do feel more firmly in support of the majority opinion now than I would have two months ago. I also recognize that this is a controversy which went on at least 15 years before this Commission started, and is likely to continue beyond the life

of this Commission.

I would point out that one of my constituents who came to the hearings on the computer software issue also put a statement in the record in support of the position that you are maintaining, John. But I think, as I review the issue and as I look back at the copyright question, I think this is almost inevitable. I think there is a true controversy here, but in looking at the options available, I do feel confident that we have chosen, in my opinion, the best option available to us.

I don't share the frustration with regard to what has happened in the photocopying issue. I think we have come a long way, and the Commission may be understating its effect and its accomplishments in this area. Partly under its sponsorship, the Commission brought to bear probably the greatest body of data that has ever been created to demonstrate what has happened in the area of machine reproduction of copyrighted words; namely, the King research report. There was no such document in existence prior to this report.

I think that the final report of the Commission itself is likely to be well received. I noted with interest the circulated review of the preliminary findings published in the STM newsletter, in which one of the points that they made

was that they were quite pleased with the economic data that this final report includes, and that this gives a further dimension to the problem.

I would simply like to conclude that I consider this to be one step in a long series of continuing discussions and developments that will help us come to grips with this area. And I brought with me, to introduce into the record, a resolution on the Copyright Five-Year Review, which is, I think, a significant expression of the American Library Association that this is a continuing problem, and I would like to have this entered into the record for information, reaffirming our interest in balancing the rights of creators, as well as with those of users of copyrighted works, and offering our resources, advice and some research capability in assisting in that five-year review.

And I would like to close by adding by commendations to the staff for the strong support that they have given to the work of the Commission.

CHAIRMAN FULD: Anyone on this side of the table?
Gabe Perle?

COMMISSIONER PERLE: First, the last 33 months, I think, we have been associated with a rather unique group of people, both the Commissioners and staff; they are good, I

think, uniformly and universally. I think the Commission has been unique for its attendance, its attention, its tolerance, its tyranny, its tact and its humor. And humor is part of this whole thing. There have been some pretty outrageous things said, but said with humor, with warmth, with passion perhaps, and taken in quite the same way.

I think what we have done is we have survived and come up with something that provides a framework, a frame of reference for whatever legislation will or will not be enacted in this area. I think we have fulfilled our statutory charge, and I think we have come up with a report.

The only think I would like to say about the report, aside from the fact that I think the report reflects and represents not only the view of the Commission, but it represents a right view, and I hope that we and those who read and are affected by the report will remember that there is a report and that dissent is really dissent, so that the impact and force of what I consider to be an extraordinarily good document is not in any way subverted or weakened.

It has been a pleasure, a real pleasure to have known this Commission, to have been part of it. I thank all of you.

CHAIRMAN FULD: Alice?

COMMISSIONER WILCOX: Go ahead.

COMMISSIONER SARBIN: I do share the views expressed earlier about the pleasures of working with this group and with the staff. It has, indeed, been a very conscientious group, and I have really been surprised constantly by the wonderful spirit with which we engaged in our deliberations.

I would like, just in closing, to respond to one thing you said, John, about the abilities of lawyers in these matters. When I was going to law school, I don't think anything was impressed more upon me than the need to look 10 or 15 years down the line when one was trying to make a decision about a matter.

What was urged was not to argue the point so well that you prevailed, but really to try to see where society would be. I know that to a Yale man, it may sound very unusual that this could happen at Harvard, but it did.

(Laughter.)

COMMISSIONER SARBIN: I do feel that the lawyers participated in that spirit on this Commission and that you did not suffer at all from any lack of ability in the presentation of your case or from any superior or clever capability on the part of the lawyers here.

I think that was a very, very fine aspect of the work.

So, although I am a lawyer who no longer practices, I wanted to say a word for the lawyers in that respect.

CHAIRMAN FULD: We need it.

COMMISSIONER SARBIN: Yes, I think so.

CHAIRMAN FULD: Alice?

COMMISSIONER WILCOX: Well, there is not much left to say after everybody has said many of these things, but CONTU, I think, did again demonstrate that knowledgeable people can have different opinions about important issues.

I suppose my disappointment has been that on the one issue, we took a narrow interpretation and not a broad one, and that is that while Congress constantly, in the Act, spoke on reproduction, we took a narrow view on photocopying. And I think it was a semantic problem that trapped us in what John said earlier.

John, you suffer from not being a lawyer, but I suffer from not even being able to speak, but I think it also demonstrated that there is a critical role for the public sector to play that we seldom hear. Probably the most important thing we did was say that the public sector is going to have to continue monitoring or balancing the role of the creator and the user, because it is creative ideas in their great diversity, whether they are economically feasible or not,

that are in the public good and must be protected.

CHAIRMAN FULD: Does anyone else wish to speak?

COMMISSIONER PERLE: Yes, there is just one further point in defense of Commissioner Hersey. There was a man who went to the doctor; the doctor examined him and said, "You have a very rare disease; it is sort of a loss of brain cells. A couple of years ago, we would have said that you simply would expire after a while and become a vegetable; now we do have a method of treating this which has been proved successful.

"It is still in its experimental stage, so that we are perfectly willing to take you into the university hospital and perform all the surgical services without cost, but there will be one cost involved. This involves a process of distillation of brains of other people and we will have to pay for the brains."

And the patient said, "How much are these brains?" He said, "Well, it really depends upon the type of brain that you want. If you want a doctor's brains, it would cost about \$1,000; a business executive's brain is about \$1,500; a lawyer's brain is about \$7,000."

The patient stopped him and he said, "I'm a lawyer. Why in the world are the brains so expensive?" And the doctor said, "Do you know how many lawyers we have to kill to get one

ounce of brains?"

(Laughter.)

CHAIRMAN FULD: Do you want to top that off?

MR. LEVINE: I could only top it by suggesting the corollary punch line, which is lawyers' brains are largely unused.

Speaking for the entire staff, it has truly been a rewarding experience for all of us over these past three years. We have profited immensely from working with all of you. It has been demanding for us, because we knew we had a highly intelligent, thoughtful and critical group of Commissioners that we had to prepare material for.

We hope we haven't, at times, swamped you with paperwork. I suspect that your offices will have to have been expanded by the amount of material that we sent to you. The Commission began in three separate and distinct groups. It has been very difficult over the course of the Commission's existence to discern parochial views among any of you.

I would suggest that the greatest differences -- for example, on computer programs -- were between Gabe Perle, a member of the author-proprietor group, and John Hersey, a member of that group. I think the spirit that was engendered on this Commission, as Dan Lacy said, would be well-served if

it were carried over to some of the discussions that will go on in the future among librarians and authors and publishers.

Along those lines, the Register of Copyrights, in implementing the five-year review, will begin in August meeting with librarians, authors and publishers to begin the process of collecting information and data for the five-year review. She has asked me to attend at least the initial meetings while I am still a member of the CONTU staff; the staff funding continues through the end of September.

I just want publicly to thank Bob Frase, Mike Keplinger, and all of the other members of the CONTU staff -- Jeff Squires, Chris Meyer, Pat Barber, David Peyton, Dee Dougherty, and the secretaries and former members of the staff, all of whom know the debt that I owe them for the work that the staff produced.

It has, as I said earlier, been a truly rewarding experience for me to work with Judge Fuld, Mel Nimmer, and all the rest of you, and I certainly do hope that the friendships that we have all made over the past 33 months will continue well into the future.

After all of that soapy stuff, let me also make an announcement. Bob Wedgeworth has brought with him a copy of "The Speaker," the controversial film produced by the American

Library Association. And those of you who wish to see it right after the meeting, it will be shown in Room 1046, in the Annex.

COMMISSIONER PERLE: How long does it take?

MR. LEVINE: How long does it take, Bob?

MR. WEDGEWORTH: It is probably 35 minutes.

MR. LEVINE: About 35 minutes. Those of you who are interested in seeing it, please let me know after the meeting and I can sort of lead you over to where the room is.

COMMISSIONER HERSEY: Where do we meet in August?

MR. LEVINE: At Martha's Vineyard.

(Laughter.)

CHAIRMAN FULD: May I say that while the Register of Copyrights has the duty to reconsider the Act every five years, I think we might exercise a privilege of meeting as a Commission with the staff every five years, and let the record so indicate.

Gabe?

COMMISSIONER PERLE: I have one final regret about this Commission, and that is the fact that both Rhoda Karparkin and Arthur Miller cannot present final words.

(Laughter.)

COMMISSIONER PERLE: I would like to suggest that the

staff make arrangements both for Rhoda and Arthur to have tape-recorded final words, which are then circulated among us.

MR. LEVINE: So noted.

CHAIRMAN FULD: A very small tape.

(Laughter.)

CHAIRMAN FULD: If there is nothing more to have considered or take up or nothing more to be said --

COMMISSIONER WEDGEWORTH: Judge Fuld, are we going to take a final confirmation vote on the report?

CHAIRMAN FULD: I didn't think it was necessary, but we could. Do you think it is desirable?

COMMISSIONER LACY: I do think there ought to be some clarification about exactly where we leave it.

CHAIRMAN FULD: I ought to say I have signed letters to the President, to the Vice-President as President of the Senate, and to the Speaker of the House. You will find them in the first several pages of the bound volume.

COMMISSIONER WEDGEWORTH: Are there any substantive changes to be made to this draft report we have?

CHAIRMAN FULD: I should have said before when Arthur was speaking, I had time to glance through this early yesterday and the only changes I noted were headings and purely formal and verbal changes. If there is any editorializing

to be done, it is to be done solely in correcting what might be misspellings or other purely formal and verbal changes. There will be no substantive changes.

COMMISSIONER HERSEY: I have noted two changes I would like to make as matters of fact.

VICE CHAIRMAN NIMMER: And I have a minor change to make in my concurrence.

CHAIRMAN FULD: Well, I think they may be transmitted to Mr. Levine, and whatever changes are made will be conveyed by letter from Mr. Levine to each of you.

COMMISSIONER LACY: Mr. Chairman, I would be prepared to move that the staff, after having completed its own editing and received and considered any requests for changes submitted by members of the Commission, and have reported changes thereunder made to the Commission, that they be authorized, with the approval of the Chairman, to turn over to the Chairman finished copies of the report that will be submitted with his letters of recommendation, and I do so move.

COMMISSIONER WEDGEWORTH: Second.

CHAIRMAN FULD: Those in favor of the motion?

(A chorus of "ayes.")

CHAIRMAN FULD: Opposition?

(No response.)

CHAIRMAN FULD: There being none, the motion is carried.

Is there thought that there should be a vote on each of these? I would not have thought it necessary.

COMMISSIONER PERLE: I further move that the staff be directed to cause the report in final form to be printed and to receive the widest practicable circulation.

COMMISSIONER WILCOX: I would like to second that.

CHAIRMAN FULD: You have heard the motion. All those in favor?

(A chorus of "ayes.")

CHAIRMAN FULD: Is there any objection?

(No response.)

CHAIRMAN FULD: The motion is carried.

MR. LEVINE: If you will give us back the copies of the report, we will mail them to you if you prefer.

(Whereupon, at 11:30 a.m., the meeting was adjourned.)